

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0310-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CARLOS MOYERS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091472001

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

John William Lovell, P.C.
By John William Lovell

Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Carlos Moyers was convicted of three counts of aggravated assault with a deadly weapon—counts three, eight, and twelve of a seventeen-count indictment filed against him in connection with three separate robberies involving multiple victims. The trial court sentenced Moyers to mitigated prison terms of 6.5, five, and five years respectively, requiring him to serve the term on

count twelve consecutively to the term on count three. In his petition for review, Moyers challenges the trial court's order granting only a portion of the relief he had requested in his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. He contends the court erred by rejecting his claim that the prison terms were unconstitutionally cruel and unusual because he was a minor at the time he committed the offenses.

¶2 It is for the trial court to decide in the exercise of its discretion whether a defendant is entitled to post-conviction relief and, unless that court abuses its discretion, which includes erring on a question of law, its ruling will not be disturbed on review. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (ruling on post-conviction petition not disturbed by reviewing court absent trial court's abuse of discretion); *State v. Burgett*, 226 Ariz. 85, ¶ 1, 244 P.3d 89, 90 (App. 2010) (noting "abuse of discretion includes an error of law" and finding court had not erred and thereby abused discretion by rejecting Rule 32 challenge to aggravating circumstances court found at sentencing). Similarly, "[w]e will not disturb a sentence that is within the statutory range absent an abuse of the trial court's [broad sentencing] discretion." *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶3 In his Rule 32 petition, Moyers claimed portions of the restitution order were incorrect and raised a related claim of ineffective assistance of trial counsel. In an amended petition, Moyers challenged the prison terms, noting one was to be served consecutively to another, and arguing because he had been a seventeen-year-old minor when he committed the offenses, the sentences amount to cruel and unusual punishment

in violation of the Eighth Amendment of the United States Constitution and article II, § 15 of the Arizona Constitution. Moyers relied, in part, on *Graham v. Florida*, ___ U.S. ___, ___, 130 S. Ct. 2011, 2032-34 (2010), in which the Supreme Court concluded that a natural life term of imprisonment for a juvenile offender was unconstitutional, recognizing juveniles are a special category of offenders who have a right to rehabilitation because of their immaturity. He also relied on various articles and studies relating to human development and the notion that juveniles should be regarded as less culpable than adults for criminal conduct because their psychological and physiological immaturity causes them to act impulsively and have less control of their behavior, making them more likely to commit criminal offenses.

¶4 The trial court granted relief on the restitution claim but rejected Moyers's challenge to his sentence. The court found Moyers had "offer[ed] no authority in support of his claim that, merely because he was a minor charged and convicted as an adult, his sentence is cruel and unusual and that he is somehow entitled to 'concurrent, mitigated terms on all three offenses.'" The court added that Moyers had not distinguished his circumstances from those of any other minor who had committed these kinds of offenses and had been convicted as an adult and sentenced accordingly. The court also stated that the various articles and studies Moyers had relied on "are not reflections of any statutory or common law. Rather, they appear to reflect the opinions of selected social scientists," and do not constitute "appropriate legal authority, justifying the relief the Defendant seeks." The court concluded the sentences were well within statutory limits and it had not abused its discretion when it had imposed them.

¶5 On review, Moyers reiterates the arguments he made in his Rule 32 petition. He also contends the trial court erred when it concluded the literature and studies he cited regarding juvenile development were not proper legal authority for the relief he requested. He seems to be arguing that, as a general principle, he should not have been sentenced the same as an adult because he had committed the offenses as a juvenile. At times he also seems to be challenging the propriety of the terms as to him individually, arguing the literature and other documents contained information that constituted a mitigating circumstance specific to him that the court was required to consider.

¶6 At the outset, the trial court did not err in assessing the non-legal information Moyers relied on in support of his argument that juveniles should be regarded as having essentially diminished culpability for their criminal acts. Studies and other information regarding psychological and physiological development of juveniles do not render the sentences here categorically cruel and unusual given relevant case law and existing statutory law that has withstood constitutional challenge. Specifically, A.R.S. § 13-501(A), provides that “[t]he county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age at the time the alleged offense is committed and the juvenile is accused of” certain enumerated offenses, including the offenses with which Moyers was charged and of which he has been convicted. As Division One of this court determined in *Andrews v. Willrich*, 200 Ariz. 533, ¶ 23, 29 P.3d 880, 886 (App. 2001), a juvenile does not have a constitutional right to be adjudicated as a juvenile. *See also In re*

Maricopa Cnty. Juv. Action No. J-93117, 134 Ariz. 105, 109, 654 P.2d 39, 43 (App. 1982) (“[A] juvenile has no right to avoid adult prosecution solely because he is less than 18 years of age.”).

¶7 Moyers is correct, however, that the Supreme Court has recognized some of the principles and similar literature regarding the diminished culpability of juvenile criminal offenders. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Court held that defendants under eighteen years of age may not be sentenced to death. And in *Graham*, ___ U.S. at ___, 130 S. Ct. at 2022-23, the Court categorically prohibited natural life prison terms for juveniles who had committed non-homicidal offenses, “a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.” The Court reasoned that this was appropriate because “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.* at ___, 130 S. Ct. at 2028. In neither of these decisions, however, did the Supreme Court suggest a juvenile offender has a constitutional right not to be adjudicated and sentenced as an adult. Nor do they establish as a matter of law that any juvenile offender who, like Moyers, receives a sentence that is within the statutory limits for sentencing adults, and who have committed the same kinds of crimes, necessarily amounts to cruel and unusual punishment. Thus, to the extent Moyers is asking this court to categorically invalidate any sentence a juvenile receives under an adult sentencing scheme based on studies of juveniles and their development generally, we have no basis for doing so. Indeed, we rejected a somewhat similar argument in *State v. Kasic*, 228 Ariz. 228, ¶¶ 1, 18-21, 265 P.3d 410, 411, 414-15 (App. 2011), where the combined

concurrent and consecutive prison terms resulted in a prison term of 139.75 years and essentially amounted to a life term of imprisonment.

¶8 Nor has Moyers established the sentences as to him individually, as opposed to categorically, violate federal and state prohibitions against cruel and unusual punishment. As Moyers correctly notes, the Eighth Amendment challenge, like a challenge under the Arizona counterpart to the federal constitution, *see State v. Davis*, 206 Ariz. 377, ¶ 12, 79 P.3d 64, 67-68 (2003), is analyzed based on a gross-disproportionality review as set forth in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). *See State v. Berger*, 212 Ariz. 473, ¶ 11, 134 P.3d 378, 380-81 (2006) (Arizona courts review “Eighth Amendment challenges to the length of prison sentences under the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin*”). This review does not involve a comparison of sentences that may be imposed upon a juvenile convicted in adult court with the dispositions a juvenile might receive if adjudicated in juvenile court. *Id.* (disproportionality analysis begins with comparing gravity of offense and severity of sentence). And to be entitled to relief, the defendant first must establish the terms are grossly disproportionate after considering the “gravity of the offenses and the severity of the combined sentence[s].” *Kasic*, 228 Ariz. 228, ¶ 22, 265 P.3d at 415.

¶9 Moyers contends, as he did below, that the sentences are ““so severe as to shock the consc[ience] of society”” because he is being deprived of his constitutional right to rehabilitation. We note at the outset it is unclear whether he is complaining about the terms imposed on each count or the combined effect of consecutive terms. To the

extent Moyers is claiming the consecutive terms are what render the sentences unconstitutional overall, he has not shown how the trial court abused its discretion in denying relief. As this court pointed out in *Kasic*, “[a] defendant has no constitutional right to concurrent sentences for . . . separate crimes involving separate acts.” *Id.* ¶ 24 (alteration in *Kasic*), quoting *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). Thus, “[a]s a general rule, we do not consider the imposition of consecutive sentences in the proportionality inquiry,” nor has Moyers persuaded us there is a reason to depart from this rule here. See *id.* Moreover, in *Kasic* we rejected the defendant’s claim that the combined prison term of 139.75 years essentially deprived the juvenile of the right to rehabilitation and possible release recognized in *Graham*. *Id.* ¶ 20. Here, unlike in *Kasic*, the combined terms do not result in a sentence that exceeds Moyers’s life expectancy, and, we found such a sentence constitutional nevertheless. *Id.* ¶ 27; see also *State v. Berger*, 212 Ariz. 473, ¶ 28, 134 P.3d 378, 384 (2006) (term not unconstitutionally cruel and unusual because of length when considered in aggregate, “even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences”).

¶10 Moyers does not seem to be claiming the individual sentences of 6.5, five and five years are “shocking” and, therefore, unconstitutional, but to the extent he is, he has not established the trial court abused its discretion either when it sentenced him initially or when it subsequently denied his petition for post-conviction relief. Moyers simply has not made a threshold showing that would permit the inference that the sentences are grossly disproportionate, after comparing the offenses and the sentences he

received. *See Kasic*, 228 Ariz. 228, ¶ 27, 265 P.3d at 416. Consequently, “there is no need to conduct a comparative analysis of [Moyers’s] sentences with others in Arizona or across the nation.” *Id.*

¶11 To the extent Moyers is arguing the trial court abused its sentencing discretion here because the literature to which he refers us amounts to a specific sentencing factor relevant to him, we reject that claim as well. The record reflects the court considered that Moyers was a minor when he committed the offenses in determining the appropriate sentence. As aggravating circumstances the court found there were multiple victims, the ages of the victims, the presence of an accomplice, and the effect the offenses had on the victims. The court added, “if anything, . . . the aggravating factors outweigh the mitigating factors.” But, the court stated it was “equally concerned about the defendant’s age, and how much time the defendant would be looking at” if the court were to sentence him to presumptive terms that were all consecutive, which would amount to 22.5 years’ imprisonment. Weighing all of these factors, the court imposed mitigated terms on all three counts, ordering that the term on count twelve be served consecutively to that on count three. It is for the trial court to determine the sentence that is appropriate in a particular case after it examines its record and gives the sentencing factors the weight the sentencing court believes it deserves. *See State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998); *see also State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003) (court required to give due consideration to evidence in mitigation but weight to be given any factor for trial court to determine in exercise of its discretion).

¶12 Moyers has not established the trial court abused its discretion when it initially considered the relevant sentencing factors, weighed them, and imposed the terms that it did, or when it denied his petition for post-conviction relief. Therefore, we grant Moyers's petition for review but deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge